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**Supreme Court of the United States**

OCTOBER TERM, 1943

No. **537**

KERSH LAKE DRAINAGE DISTRICT,.....*Petitioner,*

v.

STATE BANK & TRUST COMPANY  
OF WELLSTON, MISSOURI,.....*Respondent.*

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT  
AND BRIEF IN SUPPORT THEREOF.

CHARLES T. COLEMAN,  
BURK MANN,  
RICHARD B. McCULLOCH,  
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*Counsel for Petitioner*



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STATE BANK & TRUST COMPANY  
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PETITION FOR A WRIT OF CERTIORARI  
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*To the Honorable the Chief Justice and the Associate Jus-  
tices of the Supreme Court of the United States:*

Your petitioner, Kersh Lake Drainage District, is a drainage district organized under the laws of the State of Arkansas, and it petitions this court for a writ of certiorari to the United States Circuit Court of Appeals for the

Eighth Circuit, to review a final decree of that court affirming an order of the district court denying a motion to dissolve an injunction and to dismiss the case for want of jurisdiction of the district court, as a court of equity, of the subject matter of the suit. .

The decision of the Circuit Court of Appeals holds in effect: (a) That the district court, as a court of equity, has jurisdiction of the subject matter of the levying, extension, collection and distribution of taxes in a drainage district in Arkansas; (b) that the district court, as a court of equity, had jurisdiction to levy a tax of  $6\frac{1}{2}\%$  per annum on the assessed benefits against each tract of land in the district to be applied in satisfaction of a judgment against the district; and (c) that a state statute, Act 46 of 1933, conferred jurisdiction on the district court to issue a mandatory injunction: (1) requiring the county clerks of the three counties in which the drainage district is situated to extend the tax levied by the court on the tax books of their respective counties; (2) to require the sheriff in each of the counties to collect the tax and pay the proceeds into the registry of the court; (3) to appoint the commissioners of the district as receivers of the court and make them subject to the control of the court; and (4) to enjoin the commissioners from paying out any of the funds of the district except on the order of the court.

Your petitioner contends that a federal court, as a court of equity, is wholly without jurisdiction of the subject matter of the levying, extension, collecting and distribution of taxes, and that a state statute cannot enlarge the equity jurisdiction of a federal court in that respect.

## I

*Summary statement of the case.*

On November 1, 1935, the State Bank & Trust Company recovered a decree for \$54,655.00 against the Kersh Lake Drainage District in the District Court for the Western Division of the Eastern District of Arkansas. This decree was affirmed on appeal.

*Kersh Lake Drainage District v. State Bank & Trust Company*, 8 C. C. A., 85 Fed. (2nd) 643.

On January 4, 1936, the Bank filed a complaint against the district on the equity side of the same court, in which it alleged that the commissioners of the district had refused to extend and collect taxes to pay the judgment on the ground that the assessed benefits had been exhausted, but that Act 467 of 1919 made benefits bear interest, and that this interest was taxable. The prayer was for a mandatory injunction requiring the taxing officers to extend a tax of 6½% per annum on the benefits, and that the commissioners, as receivers of the court, be required to collect this tax until sufficient funds were realized to pay the Bank's judgment.

The district court held that Act 467 applied to the Kersh Lake Drainage District, though that district was organized before the passage of the act. It thereupon rendered the following decree:

"It Is Therefore Considered, Ordered and Decreed that a mandatory injunction issue requiring the defendant County Clerks, N. M. Ryall and N. D. Newton, to extend upon the tax books of their respective

counties a tax of six and one-half per cent of the benefits assessed against each tract of land, railroad and tramroad in the district for each of the years 1926 and the following years until the whole of this decree has been satisfied, and that the said W. A. Dodds, as collector of Lincoln County, and H. L. Clayton, Collector of Desha County, be required to collect said drainage tax along with the County and State taxes, and to pay the same over to the Clerk of this Court until the sums hereinbefore mentioned have been paid to the plaintiff and to the interveners.

“It Is Further Considered, Ordered and Decreed that the defendants, T. H. Free, Claude H. Holthoff and Emmett Warren, as Commissioners of said district be required to institute suits for the collection of all delinquent taxes of said district, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, and that they be required to do all things necessary as commissioners of said district to insure the prompt collection of the drainage taxes; and the said commissioners of said district are deemed receivers of this court, and as such they are required to perform all their duties as such commissioners with due diligence, and report their doings to this court on the 1st day of June and December of each year, reporting all taxes collected and what action they have taken to enforce the collection of delinquent taxes.

“It Is Further Ordered that the said defendant commissioners pay out none of the funds of said district without an order of this court authorizing them to do so.”

(Rec. page 10.)

This decree was affirmed on appeal.

*Kersh Lake Drainage District v. State Bank & Trust Company*, 8 C. C. A., 92 Fed. (2nd) 783.

The only issue raised in the district court or in the Court of Appeals was whether or not Act 467 applied to this district which was organized before its passage. The question of the jurisdiction of the district court, as a court of equity, to levy a tax, and to appoint receivers to collect it, was not raised or decided either in the district court or in the Court of Appeals.

Following the affirmance of the decree the district court from time to time made numerous interlocutory orders which were wholly beyond the power of the court, and which were adverse to the interests of the district and of its landowners. The district, however, was helpless with respect to these orders, for they were not final judgments and no appeals could be taken from them.

Finally, the district filed a motion to dismiss the case on the ground that the district court, as a court of equity, was without jurisdiction of the subject matter of the suit. The motion was denied, and the district appealed.

The Court of Appeals affirmed. The court said:

"It is apparent that the object of the motion of the district involved in this appeal is to obtain a rehearing in this court of our decision in *Kersh Lake Drainage District v. State Bank & Trust Co.*, 92 Fed. (2nd) 783. \* \* \* The judges constituting the court to which this appeal is presented are not the same as those who heard the first appeal. Therefore the decision of 1937 affirming the decree in its entirety is binding upon us and will be adhered to."

The question of jurisdiction of the subject matter of the suit was not raised or decided on the former appeal. The petitioner contends that an objection to the jurisdiction of a federal court, as a court of equity, of the sub-

ject matter of the suit may be made at any stage of the proceeding until it is finally decided.

The Court of Appeals held that state Act No. 46 of 1933 enlarged the equity jurisdiction of federal courts in Arkansas, and empowered the district court to make the orders reflected by the record in this case.

## II

### *Questions presented.*

(1) Whether a federal court, as a court of equity, has jurisdiction to levy or collect taxes.

(2) Whether a federal court, as a court of equity, has jurisdiction to appoint receivers for a drainage district in Arkansas.

(3) Whether Act 46 of 1933 enlarged the equity jurisdiction of federal courts in Arkansas.

## III

### *Reasons relied on for the allowance of the writ.*

(a) The decision of the Court of Appeals that a federal court, as a court of equity, has the power to levy and collect taxes is contrary to the applicable decisions of this court.

(b) Under section 129 of the Judicial Code the Court of Appeals had the power, and it was its duty, to determine whether or not the district court, as a court of equity, had jurisdiction of the subject matter of this suit.

(c) A state legislative act cannot enlarge the equity jurisdiction of federal courts, nor can it obliterate the distinction between law and equity in such courts.

(d) The decision of the Court of Appeals that Act 46 of 1933 empowered the district court to appoint receivers for this drainage district, and to issue the mandatory injunctive orders involved in this case, is contrary to the applicable decisions of this court.

(e) The Circuit Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

#### IV.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court a full and complete transcript of the record in the proceedings of that court in *Kersh Lake Drainage District v. State Bank & Trust Company*, No. 12,593, to the end that this case may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment of the United States Circuit Court of Appeals be reversed by this court, and for such further relief as to the court may seem proper.

Dated this 15th day of November, 1943.

CHARLES T. COLEMAN,  
BURK MANN,  
RICHARD B. McCULLOCH,  
SHIELDS M. GOODWIN,  
*Counsel for Petitioner.*

## POINTS AND AUTHORITIES RELIED ON

## I

*Under Section 129 of the Judicial Code, 28 U. S. C. A. section 227, this court has the power to determine whether or not the district court, as a court of equity, had jurisdiction of the subject matter of this suit.*

*Denver v. New York Trust Company, 229 U. S. 123;*

*Smith v. Vulcan Iron Works, 165 U. S. 518;*

*Meccano v. John Wanamaker, 253 U. S. 136;*

*Deckart v. Independent Shares Corporation, 311 U. S. 282, 61 Sup. Ct. 229.*

## II

*A federal court, as a court of equity, is without power to levy a tax.*

*Meriwether v. Garrett, 102 U. S. 515;*

*Heine v. Levee Commissioners, 19 Wall. 655;*

*Rees v. City of Watertown, 19 Wall. 107;*

*Thompson v. Allen County, 115 U. S. 550;*

*Yost v. Dallas County, 236 U. S. 50.*

## III

*A federal court, as a court of equity, is without power to collect a tax already levied.*

*Thompson v. Allen County*, 115 U. S. 550;

*Street Grading District v. Hagadorn*, 8 C. C. A., 186 Fed. 451;

*Johnson v. Riverland Levee District*, 8 C. C. A., 117 Fed. (2nd) 711.

## IV

*Want of jurisdiction of the district court, as a court of equity, of the subject matter of the suit cannot be waived.*

*Lewis v. Cocks*, 23 Wall. 466;

*Brown v. Lake Superior Iron Company*, 134 U. S. 530;

*United States v. Corrick*, 298 U. S. 435, 56 Sup. Ct. 829;

*Street Grading District v. Hagadorn*, 8 C. C. A., 186 Fed. 451;

*Hagadorn v. Street Grading District*, 223 U. S. 721;

*Cutler v. Roe*, 7 How. 729;

*Morris v. Gilman*, 129 U. S. 315;

Federal Rules of Civil Procedure, Rule XII, subdivision (h);

1 Edmunds' Federal Rules of Civil Procedure, page 604.

*The district court, as a court of equity, was without power to appoint receivers to collect the drainage taxes in this case.*

*Heine v. Levee Commissioners*, 19 Wall. 655;

*Rees v. Watertown*, 19 Wall. 107;

*Meriwether v. Garrett*, 102 U. S. 472;

*Thompson v. Allen County*, 115 U. S. 550;

*Street Grading District v. Hagadorn*, 8 C. C. A., 186 Fed. 451;

*Johnson v. Riverland Levee District*, 8 C. C. A., 117 Fed. (2nd) 711;

*Guardian Savings & Trust Company v. Road Improvement District*, 267 U. S. 1, 45 Sup. Ct. 201;

*Drainage District v. Mercantile-Commerce Bank & Trust Company*, 8 C. C. A., 69 Fed. (2nd) 138;

*Mercantile-Commerce Bank & Trust Company v. Drainage District*, 293 U. S. 566, 55 Sup. Ct. 77;

*Arkansas-Louisiana Highway Improvement District v. Pickens*, 169 Ark. 603, 276 S. W. 355;

*Dickinson v. Mingea*, 191 Ark. 946, 88 S. W. (2nd) 807;

*Rogers Paving Improvement District v. Swofford*, 193 Ark. 260, 99 S. W. (2nd) 577;

*Spellings v. Dewey*, 8 C. C. A., 122 Fed. (2nd) 652;

Act 46, Acts of 1933, page 126;

Act 279 of 1909, section 7.

## VI

*A state statute cannot enlarge the equity jurisdiction of the federal courts, or obliterate the distinction between law and equity in such courts.*

Judicial Code, section 267;

*Pusey & Jones v. Hanssen*, 261 U. S. 491, 43 Sup. Ct. 454;

*Whitehead v. Shaddock*, 138 U. S. 146;

*Kelleam v. Maryland Casualty Company*, 321 U. S. 377, 61 Sup. Ct. 595;

*Sun Oil Company v. Burford*, 5 C. C. A., 130 Fed. (2nd) 10;

*Hollins v. Brierfield Coal & Iron Company*, 150 U. S. 371;

*Johnson v. Riverland Levee District*, 8 C. C. A., 117 Fed. (2nd) 711;

*Guardian Savings Company v. Road District*, 267 U. S. 1.